

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5

DATE:

OCT 22 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mary Rhew
Mary Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physicist. The petitioner is currently an assistant scientist at the University of Wisconsin-Madison (UWM). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement and supporting documents.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

(A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 12, 2011. The initial submission included background information about nuclear fusion research. The booklet *Fusion Science: Harnessing the Energy of the Stars* provided a description of the issue in terms accessible to laymen, and stated: “Once fusion technology is developed we will have an energy source to satisfy the world’s needs for millions of years” (p. 4). The technology, at present, remains under development.

In an accompanying statement, the petitioner described her work:

I am a major part of a Fusion Grade Plasma Diagnostics Development Research Group collaborating/branched out to top-two major Facilities (National Laboratory)

here in the United States, namely the DIII-D Facility at General Atomics San Diego, CA and the National Spherical Torus Experiment (NSTX) at Princeton Plasma Physics Laboratory (PPPL) at Princeton, NJ. . . .

I am responsible for the original design, testing and deployment of my unique and novel diagnostics to these major facilities. Currently, I am working on a design and development of a spectrometer using a holographic grating to measure “fast-ion-temperature-fluctuations.” The importance of my current work comes from the fact [that] by measuring “fast-ion-temperature-fluctuations,” which hasn’t [sic] been measured at DIII-D and/or NSTX at all, researchers can be able to address issues like heat, particle and momentum losses . . . [which] are predicted to be the major reason for loss of plasma confinement. However, measuring the changes using the fast-ion-thermal diagnostics will be the ultimate proof and it will put us one step closer to achieving our common goal, i.e. putting the fusion energy on the power grid. . . .

Based on my education, training and experience I am considered [to be a] one-of-a-kind experimental plasma physicist specializ[ing in] novel plasma diagnostics and data analysis techniques. Therefore, my unique abilities (as demonstrated in my past experiences and achievements including my peer-reviewed papers, citations, presentations and the papers I have reviewed) and my research involvement will serve in the national interest, i.e. as in plasma physics research helping to move towards tomorrow’s fusion power plants.

The petitioner submitted several witness letters from mentors and collaborators. [REDACTED]

[REDACTED] who supervised the petitioner’s doctoral studies at the University of Iowa, stated:

Fusion energy research has several components, but the main approach involves large magnetic chambers (called tokamaks) in which ionized gas is heated to very high temperatures. A crucial question for the eventual use of these chambers for commercial purposes is to determine how the heat escapes across the magnetic field. Many measurement techniques have been developed (called plasma diagnostics) for probing the electric and magnetic fields, and particle densities and currents in these magnetic chambers. In my laboratory, [the petitioner] learned how to do laser spectroscopy on plasma ions and she also worked with electric probes. She worked with me in studying the fluctuations caused by unstable waves – these waves are believed to be responsible for how heat energy escapes from the plasma. Since then she has become proficient in . . . crucially important measurement techniques in the fusion energy program. Her work on diagnostics is being used by others as evidenced through her recent publications in *Review of Scientific Instruments*. . . .

Her work on plasma transport processes is central to the development of fusion energy as an economical energy alternative for the United States.

[REDACTED] and [REDACTED] both of the University of Maryland, College Park, jointly signed a letter describing the petitioner's postdoctoral work there:

We collaborated on a project to inject plasmas into a prototype controlled fusion device (MCX: "Maryland Centrifugal Experiment") to provide enhanced stability against instabilities through plasma rotation during magnetic confinement. The importance of such basic plasma physics research to the U.S. leadership in new and clean energy via controlled fusion cannot be overstated.

During this period, [the petitioner] carried out ground-breaking experiments of importance to the National interest with a unique high powered plasma gun developed specifically to avoid the inherent blow-by instabilities that had plagued previous designs via electrode shaping and a specially-tailored armature. She set up an array of diagnostics to characterize the plasma jets and the penetration through the confining magnetic field and to measure the momentum transfer from the jet to the plasma. She applied unique cross-correlation technique to interpret the data, for which researchers world-wide have followed her lead and sought her advice when utilizing similar diagnostics in their laboratories.

University of Maryland [REDACTED] provided further details about the petitioner's work in Maryland:

[The petitioner] made experimental observations of the magnetic turbulence and analyzed the data to show very compelling evidence that the velocity shear was indeed acting on turbulence as had been surmised. This was the first direct proof of suppression and constitutes a key stepping-stone in the experimental campaign. Her expertise . . . was crucial to obtaining a scientifically rigorous proof of the phenomenon. In particular, she showed that the turbulence spectrum is reduced in power and cascades to longer wavelengths, both of which are key requirements to corroborate the theory of velocity shear suppression. She linked this finding to edge turbulent particle and momentum transport mechanisms in MCX. This result will remain one of the cornerstones of this experimental device and will be used in planning any future extrapolations of this concept.

[REDACTED] collaborated with the petitioner's research group on the MCX project. [REDACTED] stated:

[The petitioner's] experiments were a milestone in the development of the more hybrid approach between inertial confinement and magnetic confinement. . . . Her results help our research team at HyperV to develop more powerful plasma guns injecting higher densities at higher velocities. More importantly, these findings contribute to a much larger research community developing the Plasma Jet Magneto Inertial Fusion (PJMIF) concept here in the US.

UWM [REDACTED] stated:

[The petitioner] is the key scientific person responsible for developing a new state-of-the-art spectroscopic plasma diagnostic that is designed to measure small-scale fluctuations in the temperature of the extremely hot plasmas that are the basic fuel for proposed thermonuclear fusion energy reactors. She developed the detailed design of this instrument and has led the fabrication of the instrument and its deployment to the DIII-D National Fusion Facility for initial experiments. These measurements are crucial to developing our understanding of the thermal conductivity of these plasmas and the related potential for maximizing the power output of potential reactors. The loss of her involvement in this project would severely harm this program to study plasma fluctuations and confinement, and considerably set back our ability to improve the understanding of plasma properties for fusion power development. It is clearly in the national interest that this project continues uninterrupted.

To document her published work, the petitioner submitted copies of the cover pages of 13 articles that name her as a co-author, and documentation of numerous conference presentations. The petitioner also submitted partial copies of six articles by other research groups, including independent citations to the petitioner's work. (A seventh article includes a self-citation by three of the petitioner's co-authors.) A printout from Harvard University's SAO/NASA Astrophysics Data System listed "35 abstracts" co-authored by the petitioner. A printout from Thompson Reuters's [REDACTED] listed 12 articles by the petitioner, with a total of 23 citations to those articles. A partial printout from Google Scholar listed ten articles by the petitioner, cited 27 times. The printouts did not identify the citing articles, and therefore it is not clear how many of the 23 citations in one list overlap with the 27 in the other list, or how many of the citations are self-citations by the petitioner and/or her co-authors.

The petitioner also documented her work as a peer reviewer for various journals and conferences. A list of reviewers for *Physics of Plasmas* is five pages long and contains 1,117 names, indicating that participation in peer review is not a particularly rare privilege.

On December 13, 2011, the director issued a request for evidence, instructing the petitioner to submit additional citations as well as other evidence to establish her influence in her field. In response, the petitioner stated:

Per your request, I have attached 15 selected citations to my papers form outside my main research group. . . .

As for additional documentation for prior achievements, I have collected peer letters from well established scholars at the National Labs such as the U.S. Naval Research Lab (**NRL**), General Atomics (**GA**), and Princeton Plasma Physics Lab (**PPPL**). . . .

Within the Plasma Physics Community, I consider myself as part of a much smaller group, experimentalists with plasma diagnostic design knowledge and creative skill

set to pursue a particular physics problem that is needed to be resolved for V&V (verification and validation) for theory purposes. . . . To put [it] into . . . perspective, there are currently 2 tokamaks . . . in the United States, and I am working on a diagnostic for one of them, namely the DIII-D, for the last three years.

(The petitioner's emphasis.) The petitioner submitted evidence of 12 independent citations of her work, including duplicate copies of citations documented previously. The petitioner's figure of 15 citations is inflated because the petitioner submitted one article twice, as well as self-citations by the petitioner's co-authors at UWM.

The petitioner submitted four additional witness letters. [REDACTED]

[REDACTED] at the NRL, praised the petitioner's "knowledge and understanding of plasma turbulence and transport, along with her wide-ranging experience with plasma diagnostics," but provided few details about the petitioner's work. Instead, [REDACTED] discussed the intrinsic merit of fusion research as a possible future source of clean energy.

[REDACTED] at UWM, described "advanced diagnostic measurement systems for high temperature plasmas" and asserted that the petitioner "has advanced the development of this highly specialized system."

[REDACTED] stated:

[The petitioner] has collaborated with us at the NSTX [National Spherical Torus Experiment] over the last several years. . . . I am also familiar with her work at the DIII-D experiment at General Atomics in San Diego. She plays a vital role in the development and utilization of Beam Emissions Spectroscopy (BES) diagnostics for the US Fusion Program, both on NSTX and DIII-D. . . .

She is well known for her work in these areas, both within the US and internationally, and she has published her work in high-impact peer-reviewed journals such as *Review of Scientific Instruments*. She was recently invited to give a talk on her work at the influential [REDACTED] to be held in May 2012. I serve on the committee that selects the invited talks for this conference and [the petitioner's] nomination was strongly supported by the committee because of the innovative and unique nature of her work and the high impact that it has on fusion research.

. . . It is . . . unrealistic to expect to be able to replace her with a US citizen. At a minimum, a new person would require many years of on-the-job experience to achieve [the petitioner's] level of expertise and to be able to contribute to plasma diagnostic development at her level. This would be a major setback to research in this crucial area and would therefore be detrimental to progress in developing fusion as an energy source.

[REDACTED] stated:

The measurements that the Wisconsin group makes provide the best information we have at present on the behavior of turbulent density, temperature and velocity fluctuations in the plasma. Understanding and controlling these fluctuations is important in reducing the energy loss from the plasma and, hence, reaching our goal of a practical, new energy source. [The petitioner's] work with the Wisconsin group provided us with a new, unique way to obtain the temperature and velocity fluctuations from the basic measurements. No other fusion research device in the world has this capability at present. This determination is allowing us to make new experimental measurements of quantities that, until then, had only been speculated about by theorists. Because of these new measurements, we are now able to verify the theory and make a significant advance towards our ultimate goal.

The director denied the petition on March 12, 2012. The director acknowledged the intrinsic merit and national benefit of nuclear fusion research, but found that the petitioner had not set herself apart from others in her field. The director stated: "The petitioner's findings do not appear to have yet had a measurable influence in the larger field. While witnesses discuss the potential application of these findings, there is no indication that these applications have yet been realized." The director acknowledged the petitioner's published work, but found that it "has been cited a very small number of times." In an introductory paragraph, the director stated that "the petitioner will be employed as an assistant scientist in internal medicine."

On appeal, the petitioner states that the decision contains "a serious error" because her "field of research is engineering plasma physics which has nothing to do with 'internal medicine.'" The petitioner concludes, from this erroneous reference to "internal medicine," that her petition did not receive sufficient review.

It is beyond dispute that the petitioner's field is not internal medicine, and that the director's reference to that field is clearly in error. The same decision, however, identifies witnesses who had provided letters. Discussions of those letters include references to "plasma turbulence and transport" and other clearly identifiable aspects of the petitioner's true work. Given the overwhelming evidence that the director reviewed the correct record of proceeding and reviewed the evidence it contains, the single reference to "internal medicine" amounts to harmless error that did not affect the outcome of the director's decision.

The petitioner states: "I have never collaborated with [REDACTED] and [REDACTED] [REDACTED] and their witness letters should be considered as my influence **in the larger field**, because they know and recognize my achievements" (the petitioner's emphasis). The letters from those witnesses suggest stronger ties with the petitioner. [REDACTED], in his letter, had stated that the petitioner "is a colleague of mine, working at the DIII-D National Fusion Research Facility in San Diego. . . . I met [the petitioner] shortly after she started working with the group from [the] University of Wisconsin." [REDACTED] stated: "I have known [the petitioner] for approximately eight years, since she was a graduate student at the University of Iowa." Nevertheless, the petitioner

is correct that the record includes no evidence of direct collaboration between the petitioner and the above-named witnesses.

The petitioner disputes the director's conclusion that "there is no indication that" "the potential applications of [the petitioner's] findings . . . have yet been realized." The petitioner contends that the director selectively quoted the witness letters, omitting passages that referred to existing applications of her work. The petitioner cites [REDACTED] letter to show that the DIII-D project has, in fact, put her work to practical use, implementing a diagnostic procedure that "no other research device in the world" is using. The petitioner's point is well taken, but it remains that there is no evidence of implementation of the petitioner's work beyond the projects on which she herself has collaborated.

The petitioner asserts that the director should have given more weight to her invitation to speak at the High Temperature Plasma Diagnostics (HTPD) conference in May 2012. The petitioner states: "Every two years, the HTPD committee selects only 26 people [out of] hundreds of nominations [throughout the] whole plasma physics community." To support this claim, the petitioner submits a list of 26 speakers (including the petitioner) invited to speak at the 2012 conference, and a report on the 2010 conference. The report refers to "a total of 340 registered participants" and "26 invited talks." The evidence does not indicate that every registered participant is "nominated" to give an invited talk, or that presenting a talk at the HTPD conference is otherwise more prestigious than giving a talk at one of countless other conferences.

Furthermore, the petitioner said nothing about this invited talk when she filed the petition. In a letter submitted with her response to the request for evidence, the petitioner stated that she had "just received an invitation" to speak at the HTPD conference. The date on the letter is February 18, 2011, but the year is incorrect and should read 2012. The record indicates that the petitioner received this invitation on January 26, 2012, after the petition's September 12, 2011 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner acknowledges that her publications have yielded few citations, but asserts that USCIS must take into account the nature of her work:

What I do is not the same at all [as that of] a theorist who[] can produce papers and get cited [widely] in a short time, because they run simulations on computers without needing a laboratory, and they can produce fast results, [and] compare their findings with each other by citing. I, on the other hand, have to build a laboratory, and produce my diagnostic work which sometimes takes years to develop. . . . My small number of citations is due to this fact, but they are very valuable, maybe not in quantity, but in **quality**.

The petitioner submits no evidence (such as comparative citation figures) to support the above assertion. It cannot suffice for the petitioner simply to observe that theoretical physicists work differently than experimental physicists. Furthermore, the petitioner has not established that the "quality" of her citations exceeds those earned by others in her specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner protests that the director did not mention her peer review work. The petitioner claims:

Since a peer-reviewer, i.e. judge, is hand picked by the editor of the journal specifically based on [the] judge's interest, and **prior achievements** and most importantly [the] judge's influence in the concept of the paper that is being considered, I strongly believe that this is a significant achievement, and shows my influence in the whole field, not everyone get[s] to be an independent judge of someone else's work.

(The petitioner's emphasis.) Above, the petitioner has made additional claims that the record does not support. The petitioner has not shown that her "prior achievements" or "influence" were factors leading to her selection as a peer reviewer. As noted previously, the record shows that the petitioner was one of 1,117 referees who reviewed papers for just one journal over the course of a single year (2010). This evidence, though fragmentary, does not tend to support the conclusion that an invitation to perform peer review is the rare privilege that the petitioner claims.

The director, in denying the petition, did not conclude that the petitioner's work is without value. Certainly, she has played a significant role in various highly complex projects aimed at the goal of harnessing the power of nuclear fusion. Nevertheless, there exists no blanket waiver for plasma physicists engaged in fusion research, and the petitioner has produced no objective, documentary evidence that would persuasively set her apart from others in that admittedly rarefied specialty.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.